

FEDERAL MARITIME COMMISSION

YAKOV KOBEL and VICTOR BERKOVICH,

Complainants,

v.

HAPAG-LLOYD AMERICA, INC., LIMCO
LOGISTICS, INC., INTERNATIONAL TLC,
INC,

Respondents.

Docket No. 10-06

COMPLAINANTS' REPLY TO
RESPONDENTS' BRIEF ON
REMAND

I

INTRODUCTION

Complainants hereby reply to Respondent International TLC and Respondent Limco Logistics' Remand Briefs for the reasons set forth below.

II.

COMPLAINANTS' REPLY TO INTERNATIONAL TLC'S REMAND BRIEF

**A. SINGLE FAILURE TO OBSERVE AND ENFORCE JUST AND
REASONABLE REGULATIONS AND PRACTICES IS A VIOLATION OF SECTION
10(d)(1)**

The Commission remanded this case as to International TLC (hereafter "ITLC") to determine if ITLC, as a freight forwarder, violated Section 10(d)(1) by liquidating Complaints' three containers. Kobel et al v. Hapag Lloyd et al at p. 50 (FMC, July 12, 2013) July 12, 2013)

ITLC raised essentially the same arguments in Section II and Section V of its remand brief that were raised and decided by the majority of the Commissioners in Kobel et al v.

1 Hapag Lloyd et al. (FMC, July, 2013).

2 In particular, ITLC contends that a single failure cannot be a violation of Section
3 10(d)(1). The Commission held it is a violation of Section 10(d)(1) if OTI fails to “observe
4 and enforce established just and reasonable regulations and practices regardless of whether the
5 failure occurred for a single shipment or multiple shipments”. Kobel et al v. Hapag Lloyd et
6 al, p. 31 (FMC, July 12, 2013).

7 ITLC refers to arguments raised by the dissent in Kobel et al v. Hapag Lloyd et al
8 (FMC (July 12, 2013). However, the Commission has affirmed it holding in Kobel et al v.
9 Hapag Lloyd et al supra (July 12, 2013) in a subsequent case, Bimsha International v. Chief
10 Cargo et al at p.11 (FMC, September 4, 2013). The Commission in Bimsha supra at p. 11
11 stated:

12 “However, the Commission has indeed recognized that
13 NVOCCs violate Section 10(d)(1) when they fail to fulfill
14 NVOCC obligations, through a single or multiple actions or
15 mistakes, and therefore engage in an unjust and unreasonable
16 practice.” See Kobel et al v. Hapag Lloyd et al, __ SRR__ at p
17 19, (FMC July 12, 2013).

18 The majority in Bimsha v. Chief Cargo rejected the arguments raised by the dissent in
19 both Kobel et al v. Hapag Lloyd et al supra and Bimsha v. Chief Cargo supra. In short, the
20 arguments raised by ITLC under Section II and Section V of its Remand Brief are not
21 germane to the reasons for which this case was remanded.

22 B. ITLC ACTED AS AN UNLICENSED FREIGHT FORWARDER

23 ITLC contends that it was not acting as a freight forwarder for the shipment of
24 Complainants containers. However, the Commission found that the record strongly indicates
25 that ITLC acted as an unlicensed freight forwarder. Kobel et al v. Hapag Lloyd supra at p. 45
26 (FMC, July 12, 2013). The Commission cited various facts supporting this conclusion (Kobel
et al v. Hapag-Lloyd et al supra at p. 45). Complainants’ have enumerated at least seven
factors supporting the conclusion that ITLC acted as a freight forwarder. (Complainants’

1 Opening Post Hearing Brief p. 30) (See also Complainants' Remand Brief pp. 2-3)

2 ITLC dispatched the shipments of Complainants' containers by arranging space with
3 Limco and booking shipment through Limco the NVOCC for this shipment.

4 Barvinenko admits that he organized the entire shipment. (Barvinenko, Tr. 362)

5 Barvinenko had represented and advertised his business as delivery of cargo to various
6 countries around the world since 2005. (Barvinenko, Tr. 343) Barvinenko testified:

7 "Q: Well, I'm going to ask that question. When you call
8 yourself a freight forwarding company, what - - what do you - -
9 what are you presenting or representing to the public what your
10 services are.

11 A: Uh huh. We move cargo, make international shipments.
12 We move cargo internationally.

13 Q: Ok. And were you conducting that activity in April and
14 May, 2008?

15 A: Yes we did, but we did not issue the documents that only
16 NVOCC companies could issue. For example, bill of lading,
17 contracts with shipping lines. So we were not issuing these
18 documents." (Barvinenko Tr. 342)

19 Furthermore, ITLC in its remand brief states that it fulfilled the obligations of a freight
20 forwarder as to Complainants' containers. (ITLC Remand Brief p. 6)

21 Michael Lyamport, of Limco, also testified that ITLC acted as the freight forwarder for
22 shipment of Complainants' containers (Lyamport, Tr. 678). ITLC was listed on the bills of
23 lading as a freight forwarder in the freight forwarder box on the Limco bills of lading. (Ex 1,
24 8, 9)

25 C. ITLC DID NOT HAVE A LEGAL RIGHT TO LIQUIDATE COMPLAINANTS'
26 THREE CONTAINERS.

ITLC argues that its actions were reasonable because Complainants failed to pay ITLC
freight or storage charges or timely pick up the containers among other reasons which were
summarized by the Commission in Kobel et al v. Hapag-Lloyd et al supra p. 48, (FMC, July
12, 2013). However, the Commission rejected those arguments. The Commission stated:

"Even if all of ITLC's above allegations were true, it appears
that none of them can justify a freight forwarder's unlawful
liquidation of a shipper's cargo in breach of its freight

1 forwarder's fiduciary duty to the shipper." Kobel et al v. Hapag
2 Lloyd supra p. 49 (FMC, July 12, 2013)

3 ITLC has failed to address the threshold question as to any legal right it had as a
4 freight forwarder to liquidate Complainants' three containers. Kobel et al v. Hapag-Lloyd et al
5 supra p. 48 (FMC, July 12, 2013). Respondent's arguments do not justify the unlawful
6 liquidation of the shippers' cargo in breach of its fiduciary duty. Kobel et al v. Hapag-Lloyd
7 et al supra p. 49. (FMC, July 12, 2013)

8 ITLC also contends that its liquidation was somehow justified because Complainants
9 failed to investigate import regulations of oil products into the Ukraine and were unable to sell
10 two other containers that arrived in the Ukraine. The Commission likewise rejected those
11 allegations as a legal justification for liquidation of Complainants' three containers. Kobel et
12 al v. Hapag Lloyd et al supra p. 48, (FMC, July 12, 2013)

13 ITLC also argues that Complainants have apparently not proved damages because they
14 paid retail price for the cargo. On the contrary, the retail price is evidence of value of
15 Complainants' investment in the cargo. Moreover, the fact that two of the containers which
16 arrived in the Ukraine have not been sold, does not prove that the cargo does not have any
17 value. These two containers contained plywood and ATVs but not oil, similar to the cargo in
18 the damaged container MOGU2002520. (EX 19). Remishevsky testified that he sold the
19 plywood from the damaged container for \$10,000 and the ATVs for \$1,000 each in the
20 Ukraine, which is consistent with the amount which Complainants paid for this merchandise
21 in the United States. (See Complainants' Remand Brief p. 18)

22 III.

23 **COMPLAINANTS' REPLY TO LIMCO'S REMAND BRIEF**

24 A. LIMCO VIOLATED SECTION 10(d)(1) BY CHANGING THE BILLS OF 25 LADING WITHOUT COMPLAINANTS' CONSENT OR AUTHORITY

26 Limco contends in its remand brief that it was justified to change the bills of lading for
the shipper/consignee from Complainants to Remishevsky and to release the containers to

1 Remishevsky based upon instructions from ITLC. (Limco Remand Brief p. 4) Complainants
2 agree that ITLC acted as a freight forwarder for the shipment of their containers for the
3 reasons stated in Section II of this Reply Brief and Complainants' Remand Brief at p. 2-3.
4 However, ITLC did not have either express nor implicit authority to sell or change the bills of
5 lading. Limco knew, or should have known that ITLC did not have Complainants' authority
6 or consent for several reasons.

7 First, Limco argues that Berkovich was not the only person permitted to change the
8 bills of lading under 49 U.S.C. §80104(1)(a). However, neither ITLC nor Limco were the
9 holders of the bills of lading.

10 Second, the evidence does not support a finding that Complainants ever consented to
11 have ITLC sell their containers and cargo or instruct Limco to change the shipper/consignee
12 on the bills of lading to Remishevsky. ITLC's sale of Complainants' containers was unlawful
13 and a breach of its fiduciary duty to Complainants as a shipper. (See Complainants' Remand
14 Brief pp 3-6)

15 Third, considering the factual context in which Complainants' three containers were
16 liquidated and the bills of lading changed, Limco knew, or should have known, that ITLC was
17 not acting with the consent or for the benefit of its principal, the shipper, but rather for itself
18 to collect its freight charges of \$9,600 and to Complainants' detriment and loss of
19 approximately \$120,000 of cargo.

20 Limco knew Complainants were the owners of the containers and had direct
21 communications with Complainants, especially regarding the damaged container. Kobel et al
22 v. Hapag Lloyd et al supra p. 42 (FMC, July 12, 2013) There was no evidence Limco asked
23 Complainants about the change to the bills of lading. Kobel et al v. Hapag Lloyd et al supra
24 p. 41 (FMC, July 12, 2013) Limco knew that ITLC was liquidating the containers for reasons
25 set forth in Complainants' Remand Brief pp 10-12.

26 Fourth, Limco never received written authority or consent from Complainants to

1 change the bills of lading nor did ITLC ever present a power of attorney or other authorization
2 from Complainants to sell these containers or change the bills of lading.

3 Mere creation of an agency for some purposes does not automatically invest the agent
4 with apparent authority to bind the principal without limit. Highland Capitol Managment v.
5 Schneider, 607 F.3d 322, 328 (2nd Cir., 2010), Cert denied 131 S. Ct. 1045. A party cannot
6 claim that the agent acted with apparent authority to bind the principal when it knew or should
7 have known the agent was exceeding the scope of his authority. Highland Capital
8 Management supra p. 328. A person who is placed on inquiry as to an agent's authority and
9 has reasonable means to make inquiry is charged with actual knowledge and facts which an
10 inquiry would have discovered. Racicky v. Farmland Industries, Inc. 328 F.3d 389 (8th Cir.,
11 2003)

12 Finally, the holding in Bimsha v. Chief Cargo FMC, September 4, 2013, is applicable
13 to the instant case. Whether the NVOCC in Bimsha v. Chief Cargo's conduct is characterized
14 as misdelivery or improper delivery of shipper's containers by releasing the three containers
15 without requiring presentation of the original bill of lading, the NVOCC, (Chief Cargo)
16 nevertheless failed to fulfill its obligation to the shipper. A failure by and NVOCC to fulfill
17 its obligations is a violation of Section 10(d)(1) and it could also be a violation of the
18 Webb-Pomerene Act. Bimsha International v. Chief Cargo supra p. 4, 11 (FMC, September
19 4, 2013)

20 B. LIMCO NOT JUSTIFIED TO CHANGE BILLS OF LADING UNDER TERMS
21 OF ITS BILL OF LADING AND/OR PUBLISHED TARIFF.

22 Limco's brief on remand apparently contends for the first time that it is excused from
23 liability for its failure to deliver these containers under the exception in 49 U.S.C.
24 §80111(d)(2). In particular, Limco apparently argues that the sale of the Complainants'
25 containers was lawful under the terms of Limco's bill of lading or tariff. (Limco Remand
26 Brief p. 6) However, this statutory exemption is not applicable to Limco in the instant case for

1 several reasons.

2 First, while Limco's bill of lading may have provided for a carrier's lien, Limco never
3 enforced or acted upon its carrier's lien. Although a bill of lading was cited by Limco in its
4 Brief¹, it refers to a carrier's right to sell cargo with 30 days notice at a public auction such a
5 notice or public auction never occurred. (Limco Remand Brief p. 6)

6 Moreover, Limco throughout these proceedings has disavowed and denied any
7 participation, direction or authorization of ITLC's liquidation sale. (Limco Post Hearing Brief
8 p. 56) Lyamport testified that he was not involved in any plan for the sale of these containers.
9 (Lyamport Tr. 693-694) Barvinenko also testified that Limco did not authorize the sale of
10 these containers. (Barvinenko Tr 389)

11 Second, at the time of the liquidation sale on or about February 23, 2009, Limco had
12 already received payment for its freight charges for all of the containers except perhaps one
13 container. (See Complainants Post Hearing Opening Brief at pp 18-19) Thus a carrier's lien
14 for freight charge, if any at all, would apply to freight on only one container.

15 Limco argues that it was pressured by Hapag-Lloyd for freight and other related
16 charges such as demurrage (Limco Remand Brief p. 8). However, the Hapag Lloyd agent in
17 Poland, Ms. Ossowska, testified that these three containers in Gdynia, Poland were at the
18 terminal and that Baltic Sea Logistics was responsible for storage charges. (Ossowska Tr.
19 654-655) The containers had already been released to the destination agent appointed by
20 ITLC, Baltic Sea Logistics (BSL) (Ossowska Tr. 654) There is also no evidence that Limco or
21 ITLC ever paid any storage or demurrage charges on these containers and thus did not have
22 any lien for those storage charges.

23 The Commission noted that even if BSL pressured ITLC for storage chargers for the

24 ¹Limco refers to Section 16 of terms and conditions in Ex. 53. Remand Brief p. 6. However, Ex. 53 states that
25 ITLC is the carrier, not Limco (Paragraph 2.2 of Ex. 53). Although this exhibit was offered and received there is no
26 foundation given with Ex 52 or Ex 53. ITLC did not issue any bills of lading at the time of shipment of these containers and
was not a licensed NVOCC when the shipment was made. (See Barvinenko Tr. 342). Limco's published tariff was not
offered or received into evidence.

1 three containers, such pressure for storage charges cannot be a justification of liquidation of
2 Complainants' three containers by ITLC. (Kobel et al v. Hapag Lloyd et al supra pp. 47-48;
3 (FMC, July 12, 2013))

4 C. COMPLAINANTS ESTABLISHED DAMAGES

5 Complainants established damages under applicable Commission precedent as stated
6 in their Remand Brief at pp 15 and 16.

7 Limco contends that Complainants fail to mitigate damages because they failed to pay
8 the accruing storage and freight on two containers and secure delivery of these containers and
9 therefore Complainants are not entitled to damages. (Limco Remand Brief p. 10) Limco
10 misconstrues the doctrine of mitigation of damages as applied to the facts of this case.

11 First, failure to pay freight and storage charges or timely pick up the containers in
12 Poland does not justify the liquidation sale or give a legal right to sell these containers.
13 (Kobel et al v. Hapag Lloyd et al supra p. 49 (FMC, July 12, 2013))

14 Second, mitigation of damages in the context of breach of contract case occurs post
15 breach when the aggrieved party fails to take reasonable steps to avoid loss after the breach.
16 The primary rule is that a Plaintiff must make reasonable efforts to minimize consequential
17 damages resulting from a breach. A plaintiff must make reasonable efforts to minimize
18 consequential damages resulting from the breach. Dobbs, Law of Remedies §12.6(2) p 127-
19 128 (2d Ed, 1993) and Restatement of Contracts 2d §350, Comment b

20 In this case, the breach occurred when ITLC breached its fiduciary duty to
21 Complainants by liquidating the three containers and Limco changed the bills of lading
22 thereby depriving Complainants of possession of their containers. The cases cited by Limco
23 in particular, Erco Indus. Ltd. v. Seaboard Coast Line R. Co. 644 F.2d 424, 432 (5th Cir.
24 1981); Land O' Lakes Inc. v. Superior Transport of Wisconsin 500 S.W.2d 1150, 1156
25 (E.d. Wis. 2007) and Paper Magic Group, Inc. v. J.B. Hunt Transport 318 F.3d 458, 461 (3rd
26 Cir. 2003) discuss an aggrieved party's right to mitigate damages by accepting damaged

1 goods and reselling them after the carrier has breached its contract by delivering damaged
2 goods. Those facts are not applicable in the instant case. Those cases also address the
3 reasonableness of the aggrieved party's action after the breach by the carrier has occurred.

4 Complainants maintain that DSW v. Commonwealth (ALJ, 2009) as set forth in their
5 Remand Brief, is applicable to this case and the value paid by the Complainants for the oil is
6 appropriate since the market value for this oil cannot be established in the Ukraine. This case
7 is similar to the facts in DSW v. Commonwealth where in that case the market value for the
8 vehicles could not be established in Nigeria and therefore the shippers investment cost was
9 used.

10 Moreover, the cargo in Complainants' two containers, which arrived in the Ukraine
11 but remained unsold, contained plywood and all terrain vehicles (ATVs), similar to the cargo
12 that was contained in the damaged container, as stated in Section II of this Reply Brief. The
13 testimony of Remishevsky establishes that there was a market resale value for this plywood
14 and the ATVs because Remishevskiy sold this cargo in the Ukraine for approximately the
15 same price as the purchase price for the plywood in the United States. (See Complainants'
16 Remand Brief p. 18)

17 IV

18 CONCLUSION

19 Based upon the foregoing reasons and as stated in Complainants' Remand Brief, the
20 Commission should find that both ITLC and Limco violation Section 10(d)(1) of the Shipping
21 Act. Complainants are entitled to the reparations as set forth in their Remand Brief.

22 Dated this _____ day of November, 2013.

23
24 _____
25 Donald P. Roach, OSB 75317
26 Attorney for Complainants